Malaysian Bar v Dato' Kanagalingam a/l Veluppillai

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–19 OF 2003 (W)
PS GILL, RAHMAH HUSSAIN FCJJ AND HASHIM YUSOFF JCA
24 AUGUST 2004

Administrative Law — Rules of natural justice — Disciplinary proceedings — Non-disclosure of minutes of meeting and refusal to reveal names of members of board — Whether such refusal arouses reasonable suspicion of disqualified members being present during proceedings

Evidence — Adverse inference — Failure to produce material evidence — Non-disclosure of material information — Whether presumption applies — Evidence Act 1950 s 114(g)

Legal Profession — Disciplinary proceedings — Disciplinary Board — Findings of — Whether appeallable to High Court — Legal Profession Act 1976 s 103E

Statutory Interpretation — Construction of statutes — Literal approach — Section 103E of Legal Profession Act 1976 — Whether wordings of provision are plain and unambiguous

The appellant had lodged two complaints against the respondent with the Disciplinary Board ('DB') which found merit in the said complaints and decided to constitute an Investigating Tribunal to enquire into the said complaints. The respondent's appeal to the High Court, against the DB's decision was allowed with costs. Dissatisfied, the appellant appealed to this court.

The issues before this court were: (i) whether the High Court had the jurisdiction under s 103E of the Legal Profession Act 1979 to hear an appeal against DB's decision; and (ii) whether the respondent's alleged breaches of natural justice and bias by the DB were justified.

Held, dismissing the appeal with costs:

(1) There was no ambiguity in s 103E, since the wordings used are 'Any party aggrieved by any decision or order made by the Disciplinary Board shall have the right to appeal to the High Court.' The DB's decision was therefore appeallable to the High Court under s 103E (see paras 13 and 18); *Duport Steels Ltd & Ors v Sirs & Ors* [1980] 1 WLR 142 followed.

(2) The DB's reply, that it was not in a position to disclose the names requested by the respondent, aroused a strong suspicion. Therefore, the High Court was correct to invoke s 114(g) of the Evidence Act 1950 against the appellant under the circumstances, thus raising the presumption that the President of the Bar Council or his alternate was present at the said meeting. Rule 4(1) of the Legal Profession (Disciplinary Board) (Procedure) Rules 1994 provides that the President of the Bar Council or his alternate is disqualified to be a member of the DB for the purposes of the quorum where the Bar Council is the complainant (see paras 15 and 17).

[**Bahasa Malaysia summary**

Perayu telah memajukan dua aduan terhadap responden kepada Lembaga Tatatertib ('LT') yang mendapati merit dalam aduan-aduan tersebut dan memutuskan untuk mewujudkan suatu tribunal siasatan untuk mempertimbangkan aduan-aduan tersebut. Rayuan responden terhadap keputusan LT telah dibenarkan oleh Mahkamah Tinggi dengan kos. Terkilan dengannya, pihak perayu membuat rayuan ke mahkamah ini.

Isu-isu di hadapan mahkamah ini adalah: (i) sama ada Mahkamah Tinggi mempunyai bidang kuasa di bawah s 103E Akta Profesyen Undang-Undang 1976 untuk membicarakan suatu rayuan terhadap keputusan LT; dan (ii) sama ada aduan pelanggaran keadilan asasi dan berat sebelah oleh LT terbukti.

Diputuskan, menolak rayuan dengan kos:

(1) Tidak terdapat taksa dalam s 103E, kerana perkataan-perkataan yang digunakan adalah 'Any party aggrieved by any decision or order made by the Disciplinary Board shall have the right to appeal to the High Court.' Maka, keputusan LT boleh dirayu ke Mahkamah Tinggi di bawah s 103E (lihat perenggan 13 dan 18); *Duport Steels Ltd & Ors v Sirs & Ors* [1980] 1 WLR 142 diikut.

(2) Alasan LT, bahawa ia tidak berkedudukan untuk mendedahkan nama-nama yang dipohon oleh responden, menimbulkan syak wasangka yang cukup tinggi. Oleh itu, Mahkamah Tinggi tepat dalam menggunapakai s 114(g) Akta Keterangan terhadap perayu dalam keadaan sedemikian, dengan itu menimbulkan andaian bahawa Presiden Majlis Peguam atau ahli silih gantinya turut hadir semasa penghimpunan tersebut. Kaedah 4(1) Legal Profession (Disciplinary Board) (Procedure) Rules 1994 memperuntukkan bahawa Presiden Majlis Peguam atau ahli silih gantinya hilang kelayakan untuk menjadi ahli dalam LT untuk tujuan korum dimana Majlis Peguam ialah pengadu (lihat perenggan 15 and 17).]

Notes

For cases on disciplinary proceedings, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1559–1560.

For cases on failure to produce material evidence, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 184–186.

For cases on literal approach, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1756–1779.

For cases on rules of natural justice applied in disciplinary proceedings, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 726–737.

Cases referred to

Duport Steels Ltd & Ors v Sirs & Ors [1980] 1 WLR 142 (folld)
DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor [2002] 2 MLJ 11 (refd)
Ngeow Yin Ngee v Majlis Peguam Malaysia [2004] 5 CLJ 467 (refd)
Palm Oil Research & Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 (refd)
Wong Pot Heng & Anor v Zainal Abidin Putih [1990] 1 MLJ 410 (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Interpretation Acts 1948 and 1967 s 17A
Legal Profession (Disciplinary Board) (Procedure) Rules 1994 r 4(1)
Legal Profession Act 1976 ss 93(3), 103E

Appeal from: High Court (Kuala Lumpur) Civil Appeal No R–17B–157 of 2002

Dato' Bastian Vendargon (T Gunaseelan & Asha Anandan with him) (Vendargon & Partners) for the appellant.
Dato' V Sivaparanjothi (KT Wong & VK Lashmi with him) (Siva & Partners) for the respondent.

Hashim Yusoff JCA (delivering judgment of the court):

[1] This is an appeal by the Malaysian Bar against the decision of the High Court consisting of three judges given on 17 November 2003 which had allowed the respondent's appeal with costs against the decision of the Disciplinary Board ('DB'). After hearing the submission by the respective counsel for the appellant and the respondent, we reserved our judgment to be given at a later date. We now give our judgment.

[2] At the outset of this appeal, the appellant had filed a notice of motion to amend the memorandum of appeal to include two additional grounds of appeal with costs of the application to be costs in the cause of the appeal. This motion was not objected to by the respondent. We therefore allowed the said application accordingly.

BACKGROUND

[3] The appellant had lodged two complaints against the respondent with the DB vide its letter dated 6 August 2002 (refer pp 118–119 of Appeal Record Vol I). The DB on 21 November 2002 vide its letter had, 'determined that there was merit in the said complaint and decided to constitute an Investigating Tribunal ('IT') to enquire into the said complaint'. The said DB letter was communicated to the respondent on 25 November 2002. The respondent then filed an appeal to the High Court against the said decision

of the DB pursuant to s 103E of the Legal Profession Act 1976 ('the LPA'). The High Court consisting of three judges allowed the respondent's appeal with costs on 17 November 2003. Now the appellant is appealing against the said decision of the High Court.

[4] The submission of learned counsel for the appellant can be summarised as follows:

(1) that the court has no jurisdiction to entertain an appeal from the decision of the DB to appoint an Investigating Tribunal to investigate and report as such decision is not a final, but merely a preliminary decision;

(2) that the respondent's alleged breaches of natural justice and bias by the DB are unfounded since no records regarding the same, nor any evidence either by affidavit or viva voce had been produced before the Court.

ISSUE REGARDING JURISDICTION

[5] To support his argument, the appellant's counsel had among others, referred to two Federal Court cases viz:

(1) *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor* [2002] 2 CLJ 57; and

(2) *Palm Oil Research & Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265.

Whereby, inter alia, it was held that it was clear beyond doubt that s 17A of the Interpretation Acts 1948 and 1967 is a statutory recognition for the courts to take a purposive approach in the interpretation of statutes including taxing statutes.

[6] The instant appeal centres primarily around the wordings of s 103E of the Legal Profession Act 1976 which provides as follows:

> Any party aggrieved by any decision or order made by a Disciplinary Board shall have the right to appeal to the High Court within one month of notification of the decision or order complained against.

[7] Learned counsel for the appellant submitted that a purposive approach to s 103E should be given as provided by s 17A of the Interpretation Acts 1948 and 1967, which reads:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[8] Learned counsel for the respondent in response submitted that a literal interpretation of the said section should be given since the wordings of the said section are very clear.

[9] In the case of *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor*, it was held, inter alia, that, 'In order to resolve the ambiguity caused by the interpretation, it was necessary to consider the purpose or object of establishing the Special Courts.'

[10] We also noted that in the *Palm Oil Research* case, the Federal Court had recognised that there was an ambiguity in determining the distinction between the seed and the kernel of the oil palm. In order to resolve such ambiguity, the court adopted the purposive approach in the interpretation of statutes as provided by s 17A of the Interpretation Acts 1948 and 1967.

[11] In the case of *Wong Pot Heng & Anor v Zainal Abidin Putih* [1990] 1 MLJ 410, his Lordship Mohamed Azmi SCJ in delivering the judgment of the Supreme Court at p 414 said:

> The purposive construction of statutes was first adopted by the House of Lords in the *Fothergill v Monarch Airlines* [1980] 3 WLR 209. It is a well-established principle that the purposive approach to the interpretation of legislation only applies where any doubt arises from the terms or words employed by the legislature. But where the words are precise and unambiguous, then the literal and strict construction rule should apply..

And further, his Lordship said:

> We cannot read or imply into the laws a provision that depositors must be given priority over other creditors. Indeed, the speech of Lord Goddard CJ in *R v Wimbledon Justices, ex p Derwent* at p 384, relied on by counsel that the court, 'cannot add words to a statute or read words into it which are not there', and the statement of Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners* at p 71 that, 'nothing is to be read, nothing is to be implied; one can only look fairly at the language used', lend support to what we have adverted to earlier, that where the words used by the legislature are clear, the purposive approach to interpretation of legislation must not be adopted. The court must stick to the plain meaning of the words used.

[12] Reading the wordings of s 103E of the Legal Profession Act 1976, we are of the view that there is no ambiguity therein, since the wordings used are 'Any party aggrieved by any decision or order made by the Disciplinary Board shall have the right to appeal to the High Court.' We are in entire agreement with the sentiments expressed in the case of *Duport Steels Ltd & Ors v Sirs & Ors* [1980] 1 WLR 142 referred to by the learned judge in his grounds of judgment wherein Lord Diplock at p 157 held:

> Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to the plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral.

ISSUE REGARDING BREACH OF NATURAL JUSTICE AND BIAS

[13] As regards the issue of breach of natural justice and bias, the High Court had considered the non-disclosure by the DB at the request of the

respondent, of minutes of its meeting and its refusal to reveal the names of the members of the DB who had sat and determined that there was merit in the complaint against the respondent and held that s 114(g) of the Evidence Act 1950 was applicable against the DB.

[14] Section 93(3) of the Legal Profession Act 1976 provides that the DB shall consist of the following:

(a) the Chairman of the DB appointed by the Chief Justice;

(b) the President of the Bar Committee with the Vice President as his alternate; and

(c) 15 practitioner members of not less than 15 years' standing appointed by the Chief Justice.

[15] However, under r 4(1) of the Legal Profession (Disciplinary Board) (Procedure) Rules 1994, the President of the Bar Council or his alternate is disqualified to be a member of the DB for the purposes of the quorum where the Bar Council is the complainant.

[16] It is not disputed that the Bar Council is the complainant in this case. The President of the Bar Council himself had signed the letter of complaint as evident in the letter at p 118 of the Appeal Record Vol I.

[17] When the respondent requested from the DB for the names of the members of the DB who sat and decided to institute the Investigating Tribunal, the DB refused to entertain his request by saying that it was not in a position to disclose the same. Surely such a reply would arouse strong suspicion as to why the DB refused to disclose the names as requested by the respondent. Yet in the case of *Ngeow Yin Ngee v Majlis Peguam Malaysia* [2004] 5 CLJ 467 at the request of the appellant the DB had in fact furnished the appellant (lawyer) with the names of the DB members who sat in the DB meeting after the DB had made the order against the appellant. Why then could the DB have not provided the same in the instant appeal when requested by the respondent? Therefore, we think the High Court was not in error when it invoked s 114(g) of the Evidence Act 1950 against the appellant under the circumstances, thus raising the presumption that the President of the Bar Council or his alternate was present at the said meeting.

[18] For the above reasons, we agree with the learned counsel for the respondent that the said decision of the Disciplinary Board was therefore appeallable to the High Court under s 103E of the Legal Profession Act 1976. As such we find no reason to interfere with the findings of the court below. Accordingly, this appeal is dismissed with costs to the respondent. Deposit to the respondent towards account of taxed costs. My learned brother PS

Gill FCJ and learned sister Rahmah Hussain FCJ, have read this judgment in draft and have expressed their concurrence respectively.

Appeal dismissed with costs.

Reported by M Maheswaran